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No. 83-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM MASSARSKY,

Petitioner,

—vs.—

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Petitioner: William Massarsky

Respondent: General Motors Corporation*

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* Pursuant to Rule 28.1 of the Rules of the Court, the following is a listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of respondent General Motors Corporation: Colmotores, Bogota, Columbia; General Motors Iran Limited, Tehran, Iran; Isuzu Motors Limited, Tokyo, Japan; GM Allison Japan Limited, Tokyo, Japan; General Motors Kenya Limited, Nairobi, Kenya; Saehan Motor Company, Ltd., Seoul, Korea; General Motors Pilipinas, Inc., Manila, Philippines; Saudi American Machinery Maintenance Company, Ltd., Jeddah, Saudi Arabia; and Industria Delova Automobile, Kikinda, Yugoslavia.

TABLE OF CONTENTS

PAGE

PARTIES TO THE PROCEEDING i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

A. The court of appeals holding that the district court correctly entered judgment on petitioner's disparate treatment claim is correct and not in conflict with that of any other court 5

B. The court of appeals holding that the district court correctly entered judgment on petitioner's disparate impact claim is correct and not in conflict with decisions of this or any other court 11

CONCLUSION 14

TABLE OF AUTHORITIES

Cases Cited PAGE

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) 6, 7

Connecticut v. Teal, ____ U.S. ____, 73 L.Ed. 2d 130 (1983) 11, 12, 13

Dothard v. Rawlinson, 433 U.S. 321 (1977)..... 12

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 6

Geller v. Markham, 481 F. Supp. 835 (D. Conn. 1979), *aff'd*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) 11, 13

Griggs v. Duke Power Co., 401 U.S. 424 (1971)..... 12

Hazlewood School District v. United States, 433 U.S. 299 (1977)..... 12

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).... 11

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 6

Royal v. Missouri Highway & Transportation Comm'n, 655 F.2d 159 (8th Cir. 1981) 11

Smithers v. Bailar, 629 F.2d 892 (3d Cir 1980) 11

Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149 (7th Cir. 1981) 11

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 6, 7, 10

Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) 11

Statutes Cited PAGE

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.* 2

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* 2

New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1, *et seq.* 4

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RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinion of the court of appeals is reported at 706 F.2d 111 and is reproduced in Appendix A to the petition. The opinion of the district court denying petitioner's motion for a directed verdict, judgment notwithstanding the verdict, or a new trial, is not reported. It is reproduced in Appendix D to the petition.

COUNTERSTATEMENT OF THE CASE

Petitioner William Massarsky instituted this action against his employer, General Motors Corporation [hereinafter referred to as "GM"] in August, 1975, for damages allegedly resulting from his layoff in February, 1971 and failure to be

recalled. He alleged that the layoff and failure to be recalled constituted (1) a breach of his employment contract; (2) religious discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*; (3) age discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.* [hereinafter referred to as the "ADEA"]; and (4) malicious discharge. During the next six years, and continuing through trial, Massarsky's theory of the case and asserted grounds of recovery underwent constant and numerous changes.[1] He abandoned his religious discrimination claim, added his wife as a plaintiff who alleged loss of consortium, added claims of fraud and negligent misrepresentation, abandoned his claim of age discrimination with regard to his layoff, and later reasserted that claim.

The bifurcated trial in the United States District Court for the District of New Jersey ultimately proceeded on the liability issues of Massarsky's claims of: (1) discriminatory layoff in violation of the ADEA; (2) discriminatory failure to recall in violation of the ADEA; (3) fraud; and (4) negligent misrepresentation.[2]

Massarsky was first employed by General Motors in 1963, at age 40, as Senior Process Engineer in the Process Engineering Department of the Clark, New Jersey facility of the New Departure-Hyatt Bearings Division of GM. He continued to be so employed until February 28, 1971, when he was laid off due to a division-wide reduction in force as a consequence of economic conditions.

Massarsky was selected for layoff pursuant to GM policy that when merit, capacity and ability are equal, the person in

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1 As the Third Circuit majority opinion points out, even "During the course of the trial, the district court complained about the shifting nature of plaintiff's theory of recovery" (A 14 n. 16).

2 Massarsky's negligent misrepresentation claim was abandoned at trial.

the classification—herein, Senior Process Engineer—with the least company-wide service will be laid off. During the exit interview between Massarsky and Robert Martin, GM Clark Plant Personnel Director, Massarsky asked why Joseph Biondo was not selected for layoff. Martin told Massarsky that Biondo was a fifth-year GMI (General Motors Institute) student, still in college, and exempt from layoff for that reason. From that, Massarsky concluded Biondo would not be laid off because he was a student. The retention of Biondo was consistent with GM policy that GMI students are not subject to layoff.

GMI is a fully accredited college that awarded its students baccalaureate degrees in mechanical engineering, electrical engineering, industrial engineering, and industrial administration, upon their completion of a five-year cooperative education program. During the first 4½ years, the GMI student spends alternating six-week time periods in the academic classroom program at GMI in Flint, Michigan and in the work experience program at the GM plant sponsoring the student. Like students at other engineering and management colleges, GMI students take courses in mathematics, sciences, humanities, English, communications, engineering sciences, management science, and economics. During the last half of the fifth year, the GMI student, located full time at the GM-sponsoring plant, writes a dissertation based upon prior library research and upon empirical data obtained in connection with a specific project performed during the student's work experience phase at the GM plant during that time period. Only upon successful completion of his or her course work, work experience, and dissertation, is the GMI student eligible for graduation. If the GMI student were interrupted at any time during the five-year program, he or she would not receive a degree. GMI students are not guaranteed employment with GM upon graduation. They are only guaranteed the opportunity to complete their degree requirements absent academic deficiencies. For this reason, GM has the policy that GMI students, while they are students, are not subject to layoff.

The differentiating factor, for layoff selection, between Massarsky and Biondo was Biondo's student status—not age.

Massarsky was not recalled to employment until February 27, 1976, because there were no openings in the Process Engineering Department at Clark for which a laid-off employee was eligible to be considered prior to that time. Pursuant to GM policy, when a job position must be filled, GM first attempts to fill the position by transferring or promoting an active employee already on the payroll into the job. When an active employee already on the payroll is not available, GM seeks to fill the job position by recalling to employment a laid-off employee; when a laid-off employee is not available to fill the job, GM hires a new employee. Laid-off employees are preferred only over new hires, not over active employees. There were no new hires in the Process Engineering Department at Clark between the time of Massarsky's layoff and the time of his recall. Active employees already on the payroll were transferred and were promoted into available positions in the Process Engineering Department at Clark.

Thus, the differentiating factor, for filling openings between February, 1971 and February, 1976, between Massarsky and the four individuals who filled openings during that time, was employment status—his status as a laid-off employee and their status as active employees—not age.

On the basis of the jury's verdict and answers to special interrogatories, the district court entered a judgment of no cause of action in favor of GM on all of Massarsky's claims. By order of January 21, 1982, the district court denied Massarsky's motion for a judgment notwithstanding the verdict, for a new trial, and to amend the pleadings to assert a claim under the New Jersey Law Against Discrimination. N.J. Stat. Ann. 10:5-1, *et seq.* Petitioner appealed therefrom to the United States Court of Appeals for the Third Circuit and respondent cross-appealed. On April 14, 1983, the court of appeals affirmed, Judge Sloviter dissenting.

The panel majority held that the district court properly entered judgment in favor of GM because petitioner failed to demonstrate, as is required on motions for directed verdicts and for judgments notwithstanding the verdict, that there was

insufficient evidence to permit any finding other than in his favor. It rejected petitioner's contention that GM's defenses to his disparate treatment claims were insufficient as a matter of law, holding (1) that GM's policies based upon GMI student status were facially neutral; and (2) that there was no record support for petitioner's contention that GMI student status was limited to individuals under age forty. The majority similarly rejected petitioner's contention that he made a prima facie case of disparate impact discrimination, because his proofs in this regard were limited to the policies' effect upon him.[3]

Judge Sloviter dissented from the majority opinions on both theories. Unlike the majority, she reached the factual conclusion that petitioner proved that GMI student status is limited to individuals outside the protected age group, and thus analyzed the case as one involving facially discriminatory policies.

REASONS FOR DENYING THE WRIT

The court of appeals decision is correct and not in conflict with any decisions of this Court or another court of appeals. It is a decision based upon the facts of this case, and neither impacts the law nor affects future actions. No important issues warranting review by this Court are presented.

A. The court of appeals holding that the district court correctly entered judgment on petitioner's disparate treatment claim is correct and not in conflict with that of any other court.

Petitioner contends that the court of appeals holding that the district court properly denied his motions for a directed verdict and judgment notwithstanding the verdict on his disparate treatment claim "conflicts with decisions of this Court and of other courts of appeals establishing the criteria for

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3 Because petitioner does not seek *certiorari* with regard to the rulings on his motion for a new trial and to amend the pleadings, they are not addressed herein.

proving claims of employment discrimination," in that the court of appeals herein "misconstrued . . . the defendant's burden of rebutting a prima facie case of disparate treatment" (Pb 6-7). Review of the petition and the cases cited, however, reveals no such conflict; indeed, petitioner's and the panel majority's descriptions of the parties' burdens are nearly identical. Both petitioner (Pb 9) and the panel majority (A 9) describe the elements of a prima facie case of disparate treatment as this Court described them in *McDonnell Douglas Crop. v. Green*, 411 U.S. 792 (1973).[4] Both petitioner and the panel majority set forth the defendant's burden of production to rebut a prima facie case in accordance with this Court's decisions in *McDonnell Douglas Corp. v. Green*, *supra*, *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Petitioner states that a defendant must "articulate a legitimate, non-discriminatory reason for its actions" (Pb 10). The Third Circuit majority quotes from *McDonnell Douglas*, *supra*, 411 U.S. at 802, that the employer "bears the burden to 'dispel the adverse inference from a prima facie showing under *McDonnell Douglas*' . . . by articulating 'some legitimate, non-discriminatory reason' for its treatment of the employee" (A 10; citations omitted). That same standard was iterated by this Court in *Furnco*, *supra* at 578:

> To dispel the adverse inference from a prima facie showing under McDonnell Douglas, the employer need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection."

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4 The Third Circuit majority articulated the *McDonnell Douglas* rule, as adapted to a layoff situation, as follows: "a plaintiff alleging a discriminatory layoff need show only that he is a member of the protected class and that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably" (A 9).

It was reiterated and clarified in *Sweeney, supra*, 439 U.S. at 25, n. 2:

> [T]he employer's burden is satisfied if he simply "explains what he has done" or "produces evidence of legitimate nondiscriminatory reasons."

and again in *Burdine, supra*, 450 U.S. at 254 (citation omitted):

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proferred reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.

In short, the Third Circuit majority correctly allocated the burdens of proof and of production in accordance with well-settled[5] law. The conflict of legal standards relied upon by petitioner is non-existent; it is merely a guise for his argument that the jury erred in believing the factual proofs submitted by GM in satisfaction of its undisputed burden of articulating a legitimate, nondiscriminatory reason for its actions. That argument does not present adequate grounds for review by this Court, for the obvious reason that its impact is limited to this particular case. In any event, it is premised upon an inaccurate description of GM's defenses and of the record.

Massarsky contends that GM failed, as a matter of law, to satisfy its burden of articulating a legitimate, nondiscriminatory reason for its actions because: (1) GM's sole explanation was a policy of insulating GMI students from layoff and preferring them in filling vacancies; and (2) since only young,

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5 As was noted in *Burdine, supra*, at 257, this Court has "stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action."

recent high school graduates can be GMI students, this policy is facially discriminatory. Neither statement is supported by the record.

GM's policy with regard to GMI students (itself inaccurately stated by petitioner) was not the totality of GM's response to petitioner's case. In response to Massarsky's prima facie case with regard to layoff, GM established that Massarsky was selected for layoff pursuant to GM policy that when merit, capacity, and ability are equal, the person in the job classification (herein senior process engineer) with the least GM service will be laid off. Massarsky, having only seven years and five months of GM service in February, 1971, was the senior process engineer with the least GM service. Massarsky contended that this explanation was a pretext for intentional age discrimination, citing the retention of a GMI student, Biondo, as evidence of same. In response, GM established that Biondo, a fifth-year GMI student assigned to the process engineering department collecting data in connection with a specific project he was performing during that time period in order to complete his dissertation, was not considered for layoff because he was a student. It established that the retention of Biondo was pursuant to GM policy that GMI students are not subject to layoff, and that if Biondo had been laid off, he would have been unable to complete his dissertation and, thus, unable to graduate.[6]

GM's explanation of its failure to recall Massarsky between 1971 and 1976 was not, as petitioner would have it, a policy of preference for GMI students in filling job vacancies. Rather, GM presented evidence to show there were no vacancies for which a laid-off employee was eligible during that time. Pursuant to GM policy, when a job position must be filled, GM first attempts to fill the position by transferring or promoting an active employee already on the payroll. When no

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6 Massarsky never contended that he should have been retained to perform Biondo's function of completing a fifth-year project and a dissertation in connection therewith.

active employee is available, GM seeks to fill the position by recalling to employment a laid-off employee, and when no laid-off employee is available, GM hires a new employee. Laid-off employees receive preference only over new hires, not over active employees, and there were no new hires in the process engineering department between the time of Massarsky's layoff and the time of his recall. Only active employees already on the payroll were promoted into available positions in the process engineering department during this time period.

Despite the fact that age is a factor in neither of these policies, Massarsky contends they are facially discriminatory and, therefore, legally insufficient to rebut his prima facie case, because they benefit GMI students and GMI student status is limited to young, recent, high school graduates. This argument fails for two reasons. First, as the Third Circuit majority correctly stated, Massarsky failed to prove his assertion that only individuals outside the protected age group may become GMI students:

> General Motors' policy is not facially discriminatory because it is not expressed in terms of age. The employees who were insulated from layoff received this favorable treatment on the basis of their status as GMI students, not their age. There is nothing to indicate that older persons were precluded from becoming GMI students, or that General Motors was not acting in good faith in operating the General Motors Institute. We simply cannot infer that the Company was using student status as nothing more than a proxy for age merely because the GMI student population contained primarily younger individuals. [We see nothing in this record to show that there were no older individuals in the GMI program, but see only that GMI students were predominately recent high school graduates.]

(A 13-14; footnote inserted in brackets). Judge Sloviter's dissent and Massarsky's argument to this Court are based upon the contrary, inaccurate factual assumption that GMI

student status was limited to younger individuals.[7] The question of whether there were such proofs is, in any event, a question peculiar to this action, clearly not warranting review by this Court.

Second, Massarsky's contention that the policies expressed in terms of student status were in fact policies based upon age is relevant not to the question of whether GM satisfied its burden of articulating a legitimate nondiscriminatory reason for its action, but to the question of whether the stated reasons were pretextual. A policy articulated in terms of student status is facially neutral because on its face it does not take age into consideration, and under the cases cited by petitioner, an employer need do no more than articulate such a policy to rebut a prima facie case.[8] If student status is in turn limited to individuals under the age of forty, that does not render the otherwise neutral policy facially discriminatory. It creates an issue of fact as to whether the articulated, neutral reason was a pretext. That factual question was properly submitted to the jury in the instant action, and the jury reached a verdict in favor of GM. As the district court succinctly stated, this factual question—not the well-established legal precepts applied—was the determinative factor in the case:

> It was plaintiff's burden to convince the jury that this reason [GMI student status] was a [mere] pretext for age

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7 The dissent's analysis of Massarsky's disparate treatment claim, as well as his discriminatory impact claim are based specifically on the factual conclusion that GMI students are all under 40 (A 32-33; 35). The dissent's reference to the majority opinion's footnote 4 (A 33; 3) in support of this conclusion indicates that the evidence relied upon was testimony that applicants for GMI are *primarily* high school students. The majority opinion highlights the factual nature of the difference of opinion among the panel members in its footnote 18 (A 17).

8 *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981) ("to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus").

> discrimination, and he failed to satisfy this burden. The jury believed defendant's explanation that certain workers were kept on because they were students about to graduate (in their fifth of five years), and not because they were younger than plaintiff.

(A56). Whether the jury was correct in reaching this conclusion is a question which does not warrant review by this Court.[9]

B. The court of appeals holding that the district court correctly entered judgment on petitioner's disparate impact claim is correct and not in conflict with decisions of this or any other court.

Petitioner contends that the Third Circuit majority holding that the district court properly entered judgment on his disparate impact claim is in conflict with the Second Circuit's decision in *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), and this Court's decision in *Connecticut v. Teal*, ____ U.S. ____, 73 L.Ed. 2d 130 (1983). It is not.

Petitioner's proof of disparate impact in the instant action was limited to the fact that the policies in question had an adverse effect upon him. He admittedly (Pb 17) presented no statistical or other evidence to show how, or if, these policies

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9 Petitioner suggests in passing (Pb 10 n. 2) that the plaintiff in an age discrimination case need not prove that the alleged discrimination was intentional. In support of this contention, only one case is cited, *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149 (7th Cir. 1981), and the discussion of the intent requirement therein was *dicta*, rendered in connection with the issue of what constitutes a willful violation of the ADEA. Decisions to the contrary include *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979); *Geller v. Markham*, 481 F. Supp. 835, 839 (D. Conn. 1979), *aff'd*, 635 F.2d 1027 (2d Cir. 1980) (modified with respect to damages), *cert. denied*, 451 U.S. 945 (1981); *Smithers v. Bailar*, 629 F.2d 892, 894 (3d Cir. 1980); *Williams v. General Motors Corp.*, 656 F.2d 120, 129-30 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Royal v. Missouri Highway & Transportation Comm'n*, 655 F.2d 159, 163 (8th Cir. 1981).

affected other members of the protected age group. Rather, he asked the court of appeals to assume that any policy benefitting GMI students had an adverse impact upon the protected age group.

The Third Circuit majority properly held that the effect of the policies upon Massarsky alone was insufficient to support a disparate impact claim. To establish a prima facie case of discriminatory impact, the court held, "the plaintiff must show that the employer's selection process results in unfavorable treatment of a disproportionate number of members of the protected group to which the plaintiff belongs." (A 16). See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Hazlewood School District v. United States*, 433 U.S. 299 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). He must show "that the facially neutral employment practice had a significant discriminatory impact." *Connecticut v. Teal*, ___ U.S. ___, 73 L.Ed. 2d 130 (1982).

Because Massarsky presented no evidence to show the effect of the subject policies on any employee but himself, he failed to satisfy this burden. Massarsky assumes and suggests it is self-evident that there was a disparate impact, but as the majority correctly notes, that is mere speculation. Because it was GM's policy to lay off the person with the least service (assuming merit, capacity, and ability were equal), protection of a GMI student from layoff would always affect the employees with the least service.

> Absent statistical proof, it is pure conjecture to believe that protected older individuals predominated among these short-service employees. Indeed, it is plausible that Massarsky was, as the Company maintains, "an anomaly" because he was a short-service employee in the protected age group.

(A 17).[10]

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10 Thus, Massarsky's assertion that he established disparate impact "as a logical matter" must fail. It, like the dissent's analysis, is based upon the inaccurate assumption that the student-employee distinction is in fact an over-under 40 distinction. Compare the dissent—"The analysis

The decisions in *Geller v. Markham*, *supra*, and *Connecticut v. Teal*, *supra*, are not to the contrary; they are distinguished by the fact that the plaintiffs in those cases, unlike the plaintiff here, presented evidence to show that the policies in question had a disproportionate, adverse effect on the protected class in general. In *Geller*, the proofs showed that the policy of hiring only inexperienced teachers disqualified 90 percent of the protected group and 60 percent of those under the age of forty. In *Teal*, a written examination for promotion produced a passing rate for black candidates which was only 68 percent of the passing rate for white candidates. In neither case were the proofs limited to an assumption, or an effect upon a single individual.

Petitioner's final argument is, apparently, that *Connecticut v. Teal* supports his contention that proof of adverse impact upon a single member of a protected group constitutes legally sufficient proof of discriminatory impact. The opinion in *Teal* does state that Title VII focuses on protection of the individual employee and not the minority group as a whole. However, that holding was with regard to the employer's argument in that case that the proven discriminatory impact of a written test for promotion was "cured" by a high percentage of minority promotions overall. In that context, the Court held that favorable treatment to a group as a whole (the "bottom

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which I believe appropriate for Massarsky's disparate treatment claims is based on equating GM's policies on GMI students and recent graduates with policies explicitly framed in terms of employees under 40 years of age," (A 35)—with the majority—"The dissenting opinion asserts that 'virtually 100% of the protected class is in the disfavored group' and that 'the fact that the policy may also disfavor laid off workers under 40 does not overcome the discriminatory impact on the protected class.' This assertion, though quite possibly true, is not supported by the record. The evidence does not establish that no members of the protected age class are GMI students and thereby insulated from layoff, but shows only that GMI students are predominantly recent high school graduates. More important, the dissenting opinion assumes the very issue in the case—that the Company's employment practices have a discriminatory impact on the protected class" (A 17 n. 18).

line" employee distribution) did not legitimize a discriminatory test which in and of itself served to disqualify a disproportionate number of minority candidates from consideration. The Court did not endorse the standard asserted by petitioner herein, under which every neutral policy which adversely affects even one member of a protected class would be unlawful.

In sum, petitioner has pointed to no case holding that, standing alone, proof that a single member of the protected age group has been adversely affected by an otherwise neutral policy constitutes a prima facie case of discrimination. His request of this Court is not to resolve a conflict, but to create an entirely new body of law in complete contradiction of this Court's previous decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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